United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

75-1107

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1107

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO BERTOLOTTI, JAMES CAPOTORTO, JOSEPH CAMPERLINGO, RAYMOND THOMPSON, JOSEPH DELUCA, JAMES ANGLEY and LOUIS GUERRA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR THE UNITED STATES OF AMERICA FOR REHEARING

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JAMES P. LAVIN,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

The United States respectfully petitions for a rehearing of that portion of the decision of this Court, filed November 10, 1975, that reverses the convictions of James Capotorto and Louis Guerra and remands for a new trial as to them.

Reasons for this Petition

Appellants Bertolotti, Capotorto, Camperlingo, Thompson, DeLuca, Angley and Guerra were convicted after trial of conspiring to violate the federal narcotics laws (Title 21, United States Code, Section 846). In its opinion determining appellants' appeals, this Court found

that the evidence at trial proved the existence of at least four discrete conspiracies rather than the single conspiracy charged in the indictment; that "the only common factor linking the transactions was the presence of Rossi and Coralluzzo" (slip op. at 6419); and that each of the seven appellants was therefore subjected "to voluminous testimony relating to unconnected crimes in which he took no part" (slip op. at 6423). While finding further that the record disclosed "no hearsay emanating from a member of one of the conspiracies used to the detriment of a member of another . . . and no problem of 'surprise'" (slip op. at 6421 n. 12), the Court nonetheless reversed the convictions of all seven appellants because of the assertedly "patent" (slip op. at 6424) possibility of a prejudicial "spill-over effect: the transference of guilt from members of one conspiracy to members of another." (Slip op. at 6421) (footnote omitted).

Even assuming the proof at trial evidenced multiple conspiracies, we nonetheless respectfully suggest that the Court erred in finding that appellants Guerra and Capotorto were subjected thereby to any substantial possibility of prejudice from a spill-over effect. Guerra and Capotorto, who were known to one another and who dealt directly with Rossi and Coralluzzo, each knew of and, in varying measure, participated in each of the asserted, four separate conspiracies. Since proof of each such conspiracy in which Guerra and Capotorto were involved was otherwise admissible against them at the trial of the narcotics conspiracy charged, we respectfully submit that there was no possible prejudice to either which requires reversal of their convictions, which were founded on abundant evidence of their guilt.

ARGUMENT

Since Guerra and Capotorto were involved in each of the four conspiracies proved, there was little or no possibility that their convictions were the result of the transference of guilt to them from members of a conspiracy with which they had no connection.

This Court predicated reversal of the convictions of all appellants in large measure on its finding that while there was sufficient proof that each of the asserted transactions had occurred, "the only common factor linking the transactions was the presence of Rossi and Coralluzzo." (Slip op. at 6419). The latter conclusion, we respectfully suggest, is in error. A review of the evidence makes clear that Guerra and Capotorto not only intimately participated in the two transactions which resulted in the actual distribution of approximately 30 pounds of nearly pure cocaine (Florida quartet sale and Flynn rip-off), but they as well knowingly became involved in the two aborted narcotics transactions whose ultimate objective, for Rossi and Coralluzzo, became the theft of cash (Harrison-Matthews and Lucas-Mengrone transactions). Moreover, the proof established that the association of both Guerra and Capotorto with Rossi and Coralluzzo in the business of trafficking in narcotics began before or at the beginning of the first of the conspiracies found by the Court and persisted continuously thereafter throughout the entire period of the conspiracy charged in the indictment. In such circumstances, Guerra and Capotorto could not correctly be said to have suffered prejudice from any "spill-over effect."

A. The Florida Quartet's Two Kilogram Purchase (May 1973 to September, 1973)

Both Guerra and Capotorto played prominent roles in this "orthodox [narcotics] business operation" (slip op. at 6418). In May 1973, Guerra supplied two kilograms of cocaine to Rossi for resale to Rossi's customers. Rossi sold the cocaine to Capotorto, who purchased it on behalf of himself and the other members of the Florida quartet, and gave Rossi, in part payment, $17,000-19,000 in cash (of which Guerra later received approximately $13,000). Subsequently, in further payment of the cocaine, the Florida quartet transferred to Rossi and Coralluzzo approximately 600 pounds of marijuana, which Capotorto, together with Rossi and others, helped transport from Florida to New York. From New York, with Guerra's assistance, it was transported to West Milford, New Jersey. There Guerra, Capotorto, Rossi and one other unloaded the marijuana—100 pounds of which Guerra took for himself (Tr. 170-179, 321-333).

In September, 1973, Capotorto and Guerra each separately attended a meeting with Rossi or Coralluzzo and a representative of the Florida quartet (Joseph Camperlingo), at which there were further discussions regarding what remained to be paid to the quartet for the marijuana earlier transferred (Tr. 337-339).

B. The Flynn Rip-off (July 1973 to December 1973)

Both Capotorto and Guerra played "major roles" (slip op. at 6416) in this transaction, which "had as its goal the acquisition of a massive narcotics supply and the distribution thereof." (Slip op. at 6422). In August 1973, Capotorto, Rossi and one other met in Florida with Franklin Flynn's partner, Angelo Iacono, and the latter there advised them that he and Flynn had access to vast amounts

of South American cocaine, for which they needed customers. Rossi said he would buy all the cocaine Flynn could get. Subsequently, in late August or early September 1973, in a meeting at Kennedy Airport in New York attended by Capotorto, Iacono gave to Rossi a one ounce sample of the cocaine to be delivered (Tr. 185-194).

Although there was no evidence that Capotorto or Guerra participated in the robbery by which the cocaine was later obtained from Flynn, the fact that force rather than cash was the means used to acquire possession of Flynn's cocaine could in no way shield Guerra and Capotorto from liability for their roles in a transaction whose primary objective was to possess cocaine so as to distribute it (slip op. at 6431) (dissenting opinion, Moore, C.J.).

Moreover, the Flynn robbery occurred at a point in time subsequent to the Harrison-Matthews and Lucas-Mengrone rip-offs, events of which, as we set forth more fully hereinafter, both Guerra and Capotorto had clear knowledge. From the vantage point of both Guerra and Capotorto, therefore, it was largely foreseeable that Rossi and Coralluzzo might acquire such a quantity and quality of cocaine by means other than simple payment. Indeed, the participation of Guerra and Capotorto in the Flynn transaction and the intimacy of their association with Rossi and Coralluzzo renders virtually inescapable the conclusion that each knew or learned of the means by which the Flynn cocaine had been obtained.*

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* In a telephone conversation with Peter Mengrone on September 10, 1973, intercepted as a result of the Mengrone wiretap, Guerra evidenced his knowledge that Rossi, Coralluzzo, Louis Lepore (all of whom participated in the Flynn rip-off) and numerous others had been involved in an earlier rip-off, perhaps additional to those proved at trial (S. App. 158-159).

Finally, since Guerra purchased from Rossi and Coralluzzo, men with whom he had dealt in their capacity as organized drug traffickers, a substantial quantity of cocaine—approximately two and one-half pounds—from a cache of what he knew to be a much larger quantity of nearly pure cocaine, he can hardly complain of the evidence regarding the distribution of the other 11 kilograms of that cocaine. Under the settled law of this Circuit, one who has an on-going relationship with a narcotics dealer, and who purchases from the latter bulk quantities for redistribution, is deemed to know that there are others similarly situated, who also are buying from the supplier and on whose participation the success of the over-all venture is in some measure dependent, with whom he conspires. *E.g.*, *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1112 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3201 (October 7, 1975).

Whether the sale to the Florida quartet and the robbery and distribution of the Flynn cocaine constitute, with respect to Guerra and Capotorto, two distinct objects of but a single agreement to which they were parties—as we continue to believe, *see Natarelli* v. *United States*, 516 F.2d 149, 152 (2d Cir. 1975); *cf. United States* v. *Finkelstein*, Dkt. No. 75-1154 (2d Cir. Dec. 1, 1975), slip op. at 846-847—or distinct conspiracies, as this Court found, there is little doubt that under Rule 8 of the Federal Rules of Criminal Procedure each could properly have been joined as a separate conspiracy count in a single indictment. *United States* v. *Papadakis*, 510 F.2d 287, 296 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Moreover, even if those charges were tried separately, proof of either would properly be admissible in the trial of the other as proof of a contemporaneous similar act probative of the association of the conspirators and of the origins, scope and purpose of the narcotics conspiracy

charged. *Id.* at 294-295; *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975).

C. The Aborted Heroin Transactions: the Matthews-Harrison and Lucas-Mengrone Rip-offs

On two occasions in 1973, within the space of six months, Rossi and Coralluzzo agreed to supply, first to Matthews and Harrison and then to Lucas and Mengrone, substantial quantities of narcotics for large sums of money. In each case, after a round of negotiations and the commission of numerous overt acts in furtherance of the agreement over the course of several days—including the payment of at least some portion of the purchase price—Rossi and Coralluzzo altered their original intent and determined to keep the money paid without delivering the narcotics. Guerra and Capotorto each knew of these agreements to distribute heroin and each either participated in them from their inception or became involved in the respective unfolding of events. Notwithstanding Rossi's testimony and the other evidence to the contrary, this Court apparently concluded as to both aborted transactions that from the outset they "were nothing more than a series of charades by the Rossi forces seeking to defraud" the buyers of their purchase price (slip op. at 6425). While we think the evidence clearly to the contrary, it matters little for purposes of our present argument whether the ventures in issue constituted conspiracies to defraud rather than to distribute narcotics since, even if the former, proof of the same was properly admissible against Guerra and Capotorto—each of whom became involved therein—at a trial of the narcotics conspiracy charged. Each such conspiratorial venture, contemporaneous with the narcotics conspiracy charged, is a similar act probative at a minimum of the criminal association of Guerra and Capotorto with Rossi and Coralluzzo, *United States* v. *Garelle*, 438 F.2d 366, 368 (2d

Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971), and of the structure and operation of the conspiratorial combine which effectuated the genuine narcotics transactions evidenced by the government's proof. *See United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973). While admittedly the use of such proof in the fashion suggested would entitle a defendant to a limiting instructing, the absence of such an instruction, as here, is in no sense "plain error". *United States* v. *Natale*, Dkt. No. 75-1276 (2d Cir. Nov. 28, 1975), slip op. at 813.

1. The Matthews-Harrison Rip-off (Spring 1973)

In the spring of 1973 Capotorto, through his contact Williard Williams, arranged an initial meeting between Rossi and Coralluzzo on the one hand and Frank Matthews and Harold Harrison on the other.* Together with Rossi, Coralluzzo and Capotorto attended several meetings with Matthews and Harrison for the purpose of working out the details of the sale by the Rossi group of 30 to 50 kilograms of heroin to Matthews and Harrison (Tr. 1527-1530). When the details of the agreement were made final, Matthews and Harrison tendered to Rossi and Coralluzzo a partial payment of $375,000 in cash. Pursuant to agreement, including his own, Capotorto was left as a hostage with Matthews and Harrison to insure delivery of the heroin.** Although Rossi had intended to

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* Capotorto had introduced Rossi and Coralluzzo to Williams shortly before this and Rossi, in Capotorto's presence, had given Williams two ounces of cocaine (Tr. 351-352).

** The jury was entitled to find that Capotorto would not have consented to bonding his word with his body had he not believed that the heroin was going to be forthcoming. Proof of the transaction, therefore, was highly probative, at a minimum, of Capotorto's intent to conspire with Rossi and Coralluzzo to traffic in narcotics.

obtain and provide the heroin, he was persuaded instead by Coralluzzo to abscond with the money they had received. Capotorto's release was subsequently obtained, apparently with Guerra's assistance, when Rossi and Coralluzzo returned the $375,000 to Harrison and Matthews (Tr. 347-356, 669-675).

Although there was no proof that Guerra participated in the negotiations for the sale of heroin, he clearly had knowledge of the transaction at the very time it was unfolding. Indeed, as evidenced by his subsequent wiretapped telephone conversations with Peter Mengrone (S. App. 61, 150-154), Guerra apparently played some unspecified role in securing Capotorto's release:

> Guerra: Yeah well when I hear about that, you know when I heard about that one. The only time they call me is when they gotta bring out the guns.
>
> Mengrone: Yeah.
>
> Guerra: When; when they had Big Jimmy [Capotorto] in the up over on 69th Street or something like that, they were holding him in a hotel, there that's when they call me. We got trouble, the only time I hear from them, when we got trouble (S. App. 61).

Moreover, although the Court characterized this event as "major" (slip op. at 6412), it occupied only 10 of the approximately 360 pages of trial transcript constituting Rossi's direct examination (Tr. 347-356). Accordingly, the minimal proof of this transaction with which Guerra and Capotorto were connected simply did not subject them "to voluminous testimony relating to unconnected crimes in which [they] took no part" (slip. op. at 6423), nor did it force them "to sit through weeks of damaging testimony" on such an unconnected subject (*id.*).

2. The Lucas-Mengrone Rip-off (September 1973)

In late August or early September 1973, Rossi and Peter Mengrone met with Frank Lucas and agreed to sell the latter a quantity of heroin for a total purchase price of $300,000. Rossi informed Guerra and Capotorto, as well as others, of the proposed heroin deal with Lucas. Rossi testified that:

> "Louis Guerra was very happy that a deal was going to be consummated with heroin due to the fact that we were all going to make a nice substantial amount of money." (Tr. 697).

Subsequently, Lucas paid Rossi and Mengrone approximately $30,000 in fives and tens for a kilogram and a half of heroin. Thereafter, as Rossi testified:

> "When we seen the $29,000 given us in fives and tens and twenties and knew that the people couldn't come up with large amounts of money we showed Louis Guerra and we told Louis Guerra that everything will be all right, and Louis Guerra took it upon himself to talk with Peter Mengrone." (Tr. 697-699).

Rossi's testimony in this respect was substantially corroborated by the evidence of Guerra's 23 wiretapped conversations with Mengrone. During the latter Guerra tried, initially, to assure Mengrone the transactions would be consummated; and later, that the $30,000 would be returned to Mengrone. Finally, during the latter stages of those calls Guerra advised Mengrone that he had been "beat" and sought to calm him with promises of future, profitable narcotics dealings between the two of them. While we believe the question of Guerra's intentions during these telephone conversations was one of fact for the jury, *see United States* v. *Mallah*, 503 F.2d 971, 980-981 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975),

it matters little to the thrust of our current argument whether Guerra sought to learn what Mengrone intended to do about the rip-off and to defraud him out of yet more money—as Guerra's attorney argued to the jury (Tr. 2458, 2461)—or whether Guerra sincerely undertook to salvage the narcotics transaction, so that he could recover the $30,000 owed to him by Rossi and Coralluzzo for cocaine he had supplied to them in earlier transactions. *See United States* v. *Johnson,* Dkt. No. 75-1196 (2d Cir. Oct. 30, 1975), slip op. at 332. In either event, evidence of Guerra's conversations were probative of his contemporaneous criminal association with Rossi in the business of trafficking in narcotics and thus probative of the conspiracy charged. *See United States* v. *Del Purgatorio,* 411 F.2d 84, 86-87 (2d Cir. 1969).

The Mengrone tapes also amply document Capotorto's early role in the Lucas-Mengrone transaction and his role as one of Rossi's underlings in the narcotics business, generally. In an intercepted telephone conversation of September 7, 1973, the very day Mengrone paid Rossi approximately $30,000 for a kilogram and one-half of heroin for Lucas (see Government's Brief on Appeal, p. 25), Rossi advised Capotorto that he has already received "1-½ of pure, ½ for cut" from unnamed third parties, who have "the main lot"—of what presumably was the heroin shipment to be sold by the Rossi forces to Lucas—sitting in a car (S. App. 256). Rossi further advised Capotorto that he did not "have all of it" and, as a consequence, directed Capotorto to give something back to the unnamed third parties holding the "main lot" (*id.*).

In a subsequently intercepted conversation of September 14, 1973, Rossi initially conversed with Mengrone (S. App. 199) and then handed the telephone to Capotorto (S. App. 209), who promised Mengrone that "the meet is going down" (S. App. 210) and sought to soothe Men-

grone's fears by promising the latter that their inability till then to consummate the narcotics deal would not result in Mengrone getting killed or in placing the latter's children in danger (*id.*). Whether Capotorto sought genuinely to assist in effectuating the planned heroin deal or, rather, to assist in a plan to defraud Lucas and Mengrone, evidence of the Lucas-Mengrone rip-off, including the Mengrone tapes, was admissible against him for the very reasons set forth above with respect to Guerra. Moreover, evidence of the Lucas affair was admissible because Capotorto received from Rossi $3,000-$4,000 of the money so obtained from Lucas and Mengrone, and $8,000 of the Lucas-Mengrone money was used by Rossi to finance the trip to Florida for the theft of the Flynn cocaine (Tr. 340-347).

Furthermore, while the Mengrone tapes were clearly probative of the Lucas-Mengrone rip-off, and the roles therein of Guerra and Capotorto—and admissible for that reason alone at the trial of the narcotics conspiracy charged—they clearly were probative, as well, of the sale to the Florida quartet and the robbery and distribution of the Flynn cocaine. They were, therefore, admissible on that ground also, *see United States* v. *Miranda*, Dkt. No. 75-2651 (2d Cir. Dec. 3, 1975), slip op. at 6568; *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *Deaton*, 381 F.2d 114, 118 (2d Cir. 1967), and this Court's conclusion that "they have no relevance to any of the other transactions proved at trial" (slip op. at 6425) is simply in error.

Thus, for example,* Guerra told Mengrone in the wiretapped conversations of his connection for narcotics

* For a more complete exposition of Guerra's intercepted conversations pertinent to this point, see the Government's Brief on Appeal, pp. 23-28, 57-61.

in California (S. App. 266) (Tr. 175-176, 1010-1012, 1093-1094); that he was paying rent on his "stashes" and was out $30,000 on his "other deals * (S. App. 145); that he was "reaching out to his old connections" so that he and Mengrone could make some money (S. App. 145, 147); and that he did not like "bad moves [referring to the Lucas deal] because nobody will let you make a good move" (S. App. 167). In these and other conversations Guerra clearly admitted his involvement with Rossi and Coralluzzo in "genuine" narcotics transactions—some of which had earlier been proved by the government's evidence.** The Mengrone wiretap also produced two calls directly probative of the robbery and distribution of the Flynn cocaine. The day after returning from Florida and the Flynn rip-off, Coralluzzo called Mengrone to tell him he had cocaine (S. App. 233) and Robert Browning (a participant in the Flynn robbery) that same day con-

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* Rossi, in a September 14, 1973 telephone call to Mengrone, also intercepted by the wiretap, admitted that he owed Guerra $31,000 (S. App. 207).

** For example, Rossi had testified that prior to the Lucas-Mengrone affair, in the spring of 1973, Guerra had told him and Coralluzzo that he, Guerra, had a cocaine connection in California and that Guerra had shown them a cut open tire which had been used to transport cocaine to New York. Pearson had testified that in August 1973 Guerra complained to him that he was losing money on his dealings with Rossi and Coralluzzo and that they owed him $30,000 as a result of previous cocaine deals (Tr. 1010-1012, 1093-1094)—obviously a reference in part to the two kilograms of cocaine he had sold to Rossi and Coralluzzo in May 1973 which they in turn had sold to the Florida quartet.

firmed to Mengrone that he had been in Florida (S. App. 223, 224).*

* Of the 55 intercepted calls, Guerra participated in 23, Capotorto in two and, as noted above, two were directly probative of the Flynn events. Each of the remaining conversations was between Mengrone and a co-conspirator or codefendant of Guerra and Capotorto—*i.e.*, Rossi, Coralluzzo, Pearson, Browning, Louis Lepore, Gerald Rubin and Charles Guida—who either had participated in the robbery of the Flynn cocaine (Lepore, Pearson, Browning, Coralluzzo and Rossi) or who had distributed (Guida) or purchased that cocaine after it was brought from Florida to New York (Rubin, Lepore, Pearson). The conversations of these others in substantial measure evidenced their association with one another, their familiarity with narcotics transactions and their knowledge of each other's involvement in the latter. They were, for that reason alone, highly probative of the acquisition and distribution of the Flynn cocaine, in which each had had a role. Moreover, the conversations of these others were admissible against Guerra and Capotorto because they were in some part necessary to make fully intelligible what Guerra and Capotorto themselves had said over the Mengrone wiretap and thereby to help prove the character of the Lucas-Mengrone rip-off as an act similar to the narcotics conspiracy charged.

This Court, in its opinion, seemed largely to agree with the foregoing and limited its remarks regarding the prejudice occasioned by the evidence of the Mengrone tapes to the five appellants (other than Guerra and Capotorto) as to whom there was no proof connecting them with the subject matter discussed (slip op. at 6425). Indeed, the Court's principal concern that the jury might have visited upon those who had no part in them the "shocking and inflammatory discussions about assault, kidnapping, guns and narcotics" could have no meaningful application to Guerra and Capotorto. One or the other of the latter openly discussed or was a party to conversations involving killings (S. App. 160, 207), assaults and kidnappings (S. App. 210), drug transactions generally (S. App. 212) the purchase of mannita (S. App. 211) and the possession of a "tommy gun" and a loaded "45" (S. App. 157, 159, 178). In such circumstances, any prejudice to Guerra and Capotorto as a result of the discussion of such subjects was the product of their own lips. The intercepted and similar remarks, if any, of their co-conspirators, even if inflammatory, would warrant Guerra and Capotorto no relief. See *United States* v. *Miley*, 513 F.2d 1191, 1207-1209 (2d Cir. 1975).

In light of the foregoing discussion, we think it clear that to sustain the convictions of Guerra and Capotorto, this Court need not "ascribe" to them, in contrast perhaps to the other five appellants, any "knowledge of the heavy-handed Rossi-Coralluzzo operations" (slip op. at 6419). Such knowledge, in abundance, was possessed by both Guerra and Capotorto, since each had participated in every one of the four conspiracies—the unorthodox as well as the conventional—found by the Court. In light of that fact and the jury's acquittal of eight of the other defendants of the conspiracy charge, the jury's determination of the guilt of Guerra and Capotorto on that count could not have been significantly affected, if at all, by any prejudicial spill-over.

D. Proof of Several Other Transactions

This Court bottomed its reversal of appellants' convictions on a finding of prejudice occasioned by proof of four separate conspiracies. In doing so, it accorded the government "the benefit of the doubt" (slip op. at 6422) regarding the evidence of several other transactions, finding that that evidence did not constitute proof of additional conspiracies but, rather, was simply "irrelevant" (*id.*). We note, therefore, only briefly our contrary view that the great bulk of the evidence of these other transactions not only did not constitute proof of additional conspiracies, but was highly probative of the narcotics conspiracy charged.

1. Samuels Rip-off

For example, while this Court duly noted the evidence of the Samuels rip-off (in which Rossi, after receiving the $36,000 purchase price from one Greg Samuels in Florida, refused to deliver the two kilogram of cocaine as promised) (slip op. at 6413 n. 3), it entirely omitted mention of the fact that Guerra, at Rossi's request, had supplied to the latter's emissary the two kilograms of cocaine which were carried to Florida to be sold to

Samuels and which were, a day or two later, returned to Guerra after that sale was aborted (Tr. 166-171, 704-708). That transaction predated by two months Guerra's delivery of *another* two kilograms to Rossi for resale to the Florida quartet (Tr. 170-175) and was clearly probative of Guerra's participation in the charged conspiracy to distribute narcotics.

2. Angley-Serrano Deals

The great bulk of John Serrano's testimony, including that of his dealings with Angley, was admissible as probative of the robbery and distribution of the Flynn cocaine. The ounce of cocaine Serrano bought from Angley in December 1973 and the full kilogram of the same he sought to buy from Angley a few days later—an aborted sale about which there was considerable testimony from Serrano and surveillance and undercover agents of the Drug Enforcement Administration (Tr. 1104-1125, 1157-1161, 1172-1175)—were a part of the very cocaine Rossi, Coralluzzo and others had taken from Flynn in Florida, a kilogram of which they had earlier distributed to Guerra in October 1973.* It was this cache of cocaine for whose acquisition Copotorto and Rossi had earlier negotiated with Flynn.

3. Guerra-Pearson Deals

Gary Pearson, in addition to testifying to his participation in the robbery of the Flynn cocaine, testified that from July to October 1973 he engaged in direct narcotics dealings with Guerra, during which Guerra sold cocaine to him and he sold heroin to Guerra. The evidence of these transactions was surely relevant to the conspiracy charged if only because it was in the context of the nego-

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* Serrano's testimony of his earlier six, one-ounce cocaine purchases from Angley, though unconnected to the Flynn robbery, occupied only two pages of his direct testimony (Tr. 1104-1106).

tiations and execution of these several transactions that Guerra admitted to Pearson that he had had narcotic dealings with Rossi and Coralluzzo; that the latter owed him $30,000 for a previous cocaine transaction; and that he, Guerra, had a connection for cocaine in California. Furthermore, Pearson's testimony was probative of the criminal association of Guerra and Capotorto in the narcotics business during the period of the conspiracy charged. Pearson testified that in August 1973, at Guerra's request, he had tendered one-half kilogram of cocaine to one of Guerra's customers, which the latter rejected because of poor quality. Apparently, Guerra thereafter sought Capotorto's assistance because at a later date Guerra complained to Pearson that Capotorto and two others had "ripped-off" that same customer for $12,000 and that he, Guerra, was being held responsible (Tr. 1010-1022).

These several transactions,* which the Court dismissed as "irrelevant," were therefore either in furtherance or otherwise probative of the narcotics conspiracy charged or of the participation therein of Guerra or Capotorto. Since the evidence of these transactions was not offered solely to prove the criminal character of either Guerra or Capotorto, it was properly admitted. *United States* v. *Papadakis*, *supra*; *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied* as *Burns* v. *United States*, 419 U.S. 876 (1974); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Costello*, 352 F.2d 848, 853-854 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 201 (1968).

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* While proof of the "Mannita rip-off" might arguably have been irrelevant to the proof of any narcotics conspiracy to which Guerra and Capotorto were parties, there is virtually no possibility that that evidence exposed them to any prejudice by reason of the transference of any guilt since the only defendant so involved, Vasta, was acquitted by the jury.

CONCLUSION *

The petition should be granted, and the judgments of conviction of Guerra and Capotorto should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

JAMES P. LAVIN,
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Assistant United States Attorneys, Of Counsel.

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* While this Court, in light of its disposition of the case, declined to decide whether the trial court's charge on knowledge, wilfulness and intent constituted reversible error (slip op. at 6428), we respectfully submit that the lower court's instruction to the jurors that they "should presume that a person intends the natural and probable consequences of his acts" presents here no basis for reversal. Had Capotorto or Guerra defended the charges against them on the grounds that they did not know that the substances they were accused of distributing and possessing were narcotics, reversal might be warranted. No defense relying on any such lack of specific intent to sell or distribute, however, was raised by either defendant. Accordingly, the use of the complained of phrase in an otherwise thorough and proper charge constituted at most harmless error. See the Government's brief on appeal, pp. 82-85.

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JPL:ccc

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JAMES P. LAVIN being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 9th day of January, 1976 he served a copy of the within Two (2) Copies of Government's Petition for Rehearing by placing the same in a properly postpaid franked envelope addressed:

(See attached list)

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

James P. Lavin

JAMES P. LAVIN

Sworn to before me this

9th day of January, 1976.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977

JPL:ccc

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